

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Thurgood Marshall United  
States Courthouse, 40 Foley Square, in the City of New York,  
on the 18<sup>th</sup> day of March, two thousand thirteen.

PRESENT: DENNIS JACOBS,  
Chief Judge,  
ROSEMARY S. POOLER,  
Circuit Judge.  
ERIC N. VITALIANO,  
District Judge.\*

- - - - -X

KEY ITEMS, INC.,  
Plaintiff-Appellant,

-v.-

12-1143

GLOBAL JEWELLERY SOLUTIONS, LTD.,  
EDWARD MAIEROVITZ, AND ULTIMA 2008  
LTD.,  
Defendants-Appellees.

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\* The Honorable Eric N. Vitaliano, District Judge of  
the United States District Court for the Eastern District of  
New York, sitting by designation.

1     **FOR APPELLANT:**                     STEVEN CASTALDO, Paduano &  
2   Weintraub LLP, New York, New  
3   York (Anthony Paduano, Paduano &  
4   Weintraub LLP, New York, New  
5   York, on the brief).  
6

7     **FOR APPELLEES GLOBAL**             DOUGLAS R. HIRSCH, Sadis &  
8     **JEWELLERY SOLUTIONS, LTD.**         Goldberg LLP, New York, New  
9     **AND ULTIMA 2008, LTD.:**           York.

10  
11    **FOR APPELLEE EDWARD**             Edward Maierovitz, pro se.  
12    **MAIEROVITZ:**  
13

14             Appeal from a judgment of the United States District  
15     Court for the Southern District of New York (Pitman, M.J.).  
16

17             **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
18    **AND DECREED** that the judgment of the district court be  
19    **VACATED** and **REMANDED**.  
20

21             Key Items, Inc. ("Key Items") appeals from the judgment  
22     of the United States District Court for the Southern  
23     District of New York (Pitman, M.J.), dismissing its  
24     complaint and denying its motion to amend on the basis of  
25     futility. We assume the parties' familiarity with the  
26     underlying facts, the procedural history, and the issues  
27     presented for review.  
28

29             Key Items brought this action against Ultima Diamonds,  
30     Inc. ("Ultima Diamonds"), a jewelry wholesaler, for refusing  
31     to pay for a shipment from Key Items in September 2008. Key  
32     Items obtained a default judgment against Ultima Diamonds in  
33     the amount of \$112,976.96 plus pre-judgment interest.  
34     However, the district court dismissed the suit as to Ultima  
35     2008, Ltd. ("Ultima 2008"), doing business as "Global  
36     Jewellery Solutions, Ltd." (collectively, "the Global  
37     Defendants") because they were not parties to the contract.  
38     Key Items sought leave to amend the complaint to include  
39     tortious interference and alter ego claims against the  
40     Global Defendants on the basis that Edward Maierovitz  
41     controlled both entities and wrongfully transferred assets  
42     from Ultima Diamonds to Ultima 2008 in order to render the  
43     former judgment-proof. Leave to amend was denied as futile.  
44

1 We review the denial of a motion to amend on the basis  
2 of futility de novo. See Hutchison v. Deutsche Bank Sec.  
3 Inc., 647 F.3d 479, 490 (2d Cir. 2011).  
4

5 The district court rejected Key Items's tortious  
6 interference claim, in part, on the ground that because  
7 Ultima Diamonds became defunct prior to payment coming due,  
8 its dissolution was the but-for cause of the breach, rather  
9 than any act by the Global Defendants. However, Key Items  
10 alleges that Maierovitz shut down one company (Ultima  
11 Diamonds), established a new one (Ultima 2008), and shifted  
12 assets from the old to the new--thereby causing Ultima  
13 Diamonds to breach its contractual obligations--and these  
14 allegations sufficiently plead causation. The district  
15 court acknowledged as much, explaining that if the  
16 fraudulent transfer allegation were included in plaintiff's  
17 tortious interference claim, "it probably would salvage the  
18 claim." A 239 n.4. The allegation was discounted because  
19 it appeared under the "alter ego" section of the complaint,  
20 and Key Items failed to incorporate it by reference into the  
21 recital as to tortious interference. Surely, Key Items will  
22 correct this technical defect when it files its amended  
23 complaint. It follows, then, that leave to amend would not  
24 be futile. Cf. Travelers Ins. Co. v. 633 Third Assocs., 973  
25 F.2d 82, 87-88 (2d Cir. 1992).  
26

27 The court also erred in denying Key Items's the  
28 opportunity to add an alter ego claim. Key Items must  
29 demonstrate (1) that the Global Defendants dominated Ultima  
30 Diamonds, and (2) that "such domination was used to commit a  
31 fraud or wrong that injured the party seeking to pierce the  
32 veil." Am. Fuel Corp. v. Utah Energy Dev. Co., 122 F.3d  
33 130, 134 (2d Cir. 1997).  
34

35 According to the amended complaint, just one week  
36 before Ultima Diamonds purchased more than 3,000 pieces of  
37 jewelry from Key Items, Maierovitz established Ultima 2008,  
38 another jewelry wholesaler operating in the same market, out  
39 of the same office, using the same business address and  
40 resources. After receiving the jewelry, Maierovitz then  
41 allegedly refused to pay for part of the shipment (1,700  
42 rings), transferred the assets to Ultima 2008, dissolved  
43 Ultima Diamonds, and began using Ultima 2008 to conduct his  
44 jewelry business (under the name "Global Jewellery  
45 Solutions"). Maierovitz is a director and officer of both  
46 companies, and served as the companies' primary contact  
47 person at all relevant times. No one--not even counsel for

1 the Global Defendants--could identify any individual or  
2 entity involved in the governance of these companies other  
3 than Maierovitz.<sup>1</sup>  
4

5 Key Items further alleges [i] that part of the jewelry  
6 that had been delivered to Ultima Diamonds was returned by  
7 the Global Defendants, and [ii] that Maierovitz represented  
8 to the Jewelers Board of Trade that Ultima Diamonds now  
9 conducts business as Ultima 2008. These allegations create  
10 a sufficient inference that the Global Defendants gained  
11 control of Ultima Diamonds's assets, including the jewelry  
12 that Key Items had shipped in October and November of 2008.  
13

14 Accepting the above allegations as true, as we must, we  
15 conclude that Key Items has pled almost all of the  
16 discretionary factors that "tend to identify a dominated  
17 corporation."<sup>2</sup> Am. Fuel Corp., 122 F.3d at 134. It has  
18 also adequately pled that "such domination was used to  
19 commit a fraud or wrong" against it. Id.  
20

21 For the foregoing reasons, we hereby **VACATE** the  
22 judgment of the district court and **REMAND** with instructions  
23 to grant Key Items's motion to amend its complaint.  
24

25  
26 FOR THE COURT:  
27 CATHERINE O'HAGAN WOLFE, CLERK  
28  
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<sup>1</sup> At oral argument, the Global Defendants' attorney stated that he did not know his own client's principal. When pressed, he speculated that perhaps his client is owned by a group of individuals in India.

<sup>2</sup> These factors include inadequate capitalization; the use of corporate resources for personal gain; overlap in ownership, officers, and directors; sharing the same business address and office space; the lack of business discretion displayed by the dominated corporation; whether the entities interact at arms length; whether others pay or guarantee debts of the dominated corporation; and whether the controlling entity used the property of the dominated corporation. See id.